

No. 14557

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COLONIAL TRUST COMPANY,

Appellant,

vs.

GEORGE GOGGIN, Trustee in Bankruptcy of the Estate of
Intercontinental Airways, Inc.,

Appellee.

~~REPLY~~ *OPENING*

BRIEF OF APPELLANT.

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**PAUL P. O'BRIEN,
CLERK**

TOPICAL INDEX

	PAGE
Jurisdiction	1
District Court's jurisdiction.....	1
Appellate Court	2
Specification of errors.....	2
Statement of the case.....	3
Argument	6
Summary	6
I.	
The receiver or trustee of a bankrupt acquired no better claim or title against the aircraft than the bankrupt had.....	7
II.	
The receiver or trustee has the burden of establishing the existence of a lien right in the bankrupt.....	7
III.	
Under California law the bankrupt's maximum lein is \$250.00	8
IV.	
Under the Civil Aeronautics Act, Act of June 23, 1938, Ch. 601, 52 Stat. 977, 49 U. S. C., Sections 401 through 705, liens may not attach to aircraft without the consent of the registered owner.....	10
V.	
No equitable lien arose against appellant's aircraft.....	14
VI.	
Appellee has failed to prove the reasonable value of the work performed	19
Conclusion	19
Appendix:	
Certificate of title.....	App. p. 1
Lease—Paragraphs fourth and fifth.....	App. p. 2
Title 14—Code of Federal Regulations.....	App. p. 4
Civil Aeronautics Act of 1938, Sec. 503.....	App. p. 7

TABLE OF AUTHORITIES CITED

CASES	PAGE
Boyd v. Ibbetson, 90 Cal. App. 298.....	19
Clark Supply Co., Inc., In re, 172 F. 2d 363.....	7
Hackett v. California Laundry, 7 Cal. App. 2d Supp. 757.....	18
Hammond Interior Finish Co., In re, 13 F. 2d 578.....	9
Howard v. Societa Di Unione e Beneficenza Italiana, 62 Cal. App. 2d 842.....	18
Lass v. Eliassen, 94 Cal. App. 175.....	17
Lowe v. Woods, 100 Cal. 408.....	17
Quartz Crystal Products Co., In re, 71 Fed. Supp. 949.....	16
Quest v. Sandman, 154 Cal. 748.....	17
United States v. Killoren, 119 F. 2d 364.....	16
United States v. Sampsell, 153 F. 2d 731.....	7
Veterans Air Express Co., In re, 76 Fed. Supp. 684.....	10

STATUTES

Bankruptcy Act, Sec. 69.....	7
Bankruptcy Act, Sec. 70.....	7
Civil Code, Sec. 3051	8, 10
Civil Code, Sec. 3051(a).....	9
Code of Civil Procedure, Sec. 307.....	18
Code of Civil Procedure, Sec. 1208.61	8
Code of Civil Procedure, Sec. 1208.62	8
United States Code, Title 11, Sec. 11.....	1
United States Code, Title 11, Sec. 46.....	2
United States Code, Title 11, Sec. 47(a).....	2
United States Code, Title 11, Sec. 47(b).....	2
United States Code, Title 11, Sec. 48(a).....	2

	PAGE
United States Code, Title 11, Sec. 95.....	1
United States Code, Title 28, Sec. 1334.....	1
United States Code Annotated, Title 11, Sec. 11(a).....	18
United States Code Annotated, Title 11, Sec. 109.....	7
United States Code Annotated, Title 11, Sec. 110.....	7
United States Code Annotated, Title 49, Sec. 523(a)(1), (c), (e)	12

TEXTBOOK

20 American Jurisprudence, Sec. 386, p. 349.....	19
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BRIEF OF APPELLANT.

Jurisdiction.

District Court's Jurisdiction.

The District Court obtained jurisdiction upon the filing of the "Creditors' Involuntary Petition" in bankruptcy under 11 U. S. C. Section 95 [R. 3-6]. See 11 U. S. C. Section 11, and Title 28 U. S. C. 1334. The proceeding was referred to Reuben G. Hunt, Esq., one of the referees in bankruptcy by the "Order of General Reference" of the District Court on February 3, 1954 [R. 6-7]. The appellant filed its "Petition of Reclamation of Property" to recover its aircraft which was in the possession of the Receiver, on March 11, 1954 [R. 8-10]. Appellee in its answer admitted appellant's title to said aircraft; admitted

that it had possession and that it refused to surrender same to appellant and appellee claimed that it had a lien on said aircraft for work and labor performed [R. 10-14]. The District Court had jurisdiction of the petition of the appellant by virtue of 11 U. S. C. Section 46.

Appellate Court.

The Referee held that the aircraft was subject to a lien [R. 24]. The matter was caused to be reviewed by the filing of appellant's "Petition for Review of Referee's Order" [R. 25-28]. This is an appeal from the Order of the United States District Court dated July 15, 1954 [R. 31] and from its Order of August 31, 1954, docketed and entered September 3, 1954 [R. 32-33], affirming the Order of Referee Reuben G. Hunt dated June 4, 1954 [R. 21-24]. The jurisdiction of this Court is provided for by Title 11 U. S. C. Sections 47(a) and 47(b).

Written notices of the entry of these Orders of the United States District Court were not given to the appellant and the appellant filed its notice of appeal with respect to each of said Orders [R. 31-32 and 34] within forty days from the entry thereof as provided by 11 U. S. C. Section 48(a).

Specification of Errors.

1. The Court erred in holding and concluding [R. 24] that the aircraft was subject to an equitable lien and that the amount of such lien was \$10,843.59.

2. The Court erred in holding and concluding [R. 24] that the aircraft was subject to an equitable lien for storage and that the amount of such lien could be thereafter proved up.

3. The Court erred in failing to Order the appellee to surrender possession of the aircraft to the appellant.

4. The Court erred in failing to hold that the maximum lien on the aircraft was \$250.00.

5. The Court erred in finding that the debtor corporation performed work on said aircraft of the reasonable value of \$10,843.59. This finding was in error in that the whole of the evidence [R. 38-50] is but a general report that some work was performed without any showing of the amount of time or materials spent or the value thereof from which the Court could determine the "reasonableness" of the claim.

Statement of the Case.

This appeal has grown out of a controversy between a lien claimant, the bankrupt herein, and the legal owner of an aircraft, the appellant herein. The primary question being presented by this appeal is whether the performance of work by a repairman on a registered aircraft at the request of someone other than the legal or registered owner gives rise to a mechanic's lien, legal or equitable, on the aircraft.

The one further question being presented to this Court involves the sufficiency of the evidence. This secondary issue presupposes that an equitable lien did arise in some amount. In proof of its claim of lien, the appellee produced oral testimony to describe in a general way some of the work which had been performed and justified the amount of its claim by simply introducing invoices¹ which it had rendered to certain other companies not parties to

¹Appellee's Exhibits 1 through 6.

this litigation. This Court is now asked to determine first whether this evidence was sufficient to justify a finding that the claim asserted was reasonable, and secondly whether an “*equitable lien*” was thereby created in the amount of the bankrupt’s billings.

At all times relative to this appeal the appellant has held legal title to a C-46 Curtiss-Wright aircraft bearing Civil Aeronautics Administration registration No. N53472, Serial No. 2932 [R. 22]. A certificate of title was issued by the C. A. A. on December 3, 1951, certifying the appellant to be the registered owner of this aircraft.² The appellant leased this aircraft to Air America, Inc., a corporation.³ In addition to the monthly rental the lease provided in Paragraph Fourth⁴ that Air America, Inc., would maintain this aircraft at its own expense [R. 22]. The lease prohibited subleasing the aircraft.⁵ The bankrupt performed the work in Los Angeles County, State of California, for which it claims a lien, at the request of Air America, Inc., U. S. Airlines and various individuals [R. 38-50].

It is clear from the record that the bankrupt dealt entirely with companies and/or persons other than appellant relative to the work performed on this aircraft and made no attempt to secure the written or oral consent of the appellant to the performance of this work or the lien asserted [R. 38-50]. It is also clear from the evidence, and the Court so found in finding No. VII, that the bankrupt

²Appellant’s Exhibit 3, page 1 of Appendix.

³Appellant’s Exhibit 1.

⁴See page 2 of Appendix.

⁵See page 3 of Appendix.

knew that appellant was the owner of the aircraft but did not notify appellant of the contemplated work [R. 23-24].

With the advent of bankruptcy the appellee first as Receiver and ultimately as Trustee took possession of the bankrupt's estate and appellant's aircraft. Referee Hunt ruled relative to appellant's Petition of Reclamation that the aircraft was subject to an "equitable lien" for the work performed by the bankrupt [R. 24]. Through a Petition for Review the matter was brought before Judge Westover and by an Order of August 31, 1954, appellant's Petition for Review was denied and the Order of Referee Hunt affirmed [R. 33].

Appellant would summarize the questions which are being submitted as follows:

1. Does the mere performance of work, on a registered aircraft, without the consent of the registered owner give rise to an equitable lien if such work was performed for the account of someone other than the owner and with the knowledge that such other person was not the owner?
2. Are repair invoices rendered to third parties sufficient proof of the reasonableness of the charges claimed?
3. Are repair invoices rendered to third parties sufficient proof to establish the existence of an "equitable lien" in the amount of such invoices?

ARGUMENT.

Summary.

The decision of the District Court necessitates a brief review of applicable lien law and equitable principles. Appellant will endeavor to show that the aircraft was not subject to a lien and that the District Court has in effect by-passed the law that should have governed.

The declaration of an "equitable lien" presupposes the existence of certain facts and the proper application of equitable principle to those facts. In this instance we have the mere performance of work by the bankrupt on an aircraft which was not paid for. A debt was created in favor of the bankrupt. That debt was not owed by any party to this litigation. Appellant has, through the vehicle of a lien, been saddled with that debt.

The appellant contends that the District Court erred and did so by erroneously assuming that the Court's equitable jurisdiction was the sole measure of the substantive rights involved. Appellant's view is that the District Court sitting in bankruptcy has both legal and equitable jurisdiction but that it should exercise that jurisdiction, judgment and power with due regard to both legal and equitable rights. This it has not done. Although recognizing that appellant is the legal owner of the aircraft [R. 22], the Court has denied appellant's proprietary rights.

I.

The Receiver or Trustee of a Bankrupt Acquired No Better Claim or Title Against the Aircraft Than the Bankrupt Had.

Bankruptcy Act, Sections 69 and 70, 11 U. S. C. A. 109 and 110.

In *United States v. Sampsell* (9th Cir., 1946), 153 F. 2d 731, 735, it was held that "The trustee acquires no better title than the bankrupt himself had." (There are exceptions not involved in this instance.)

II.

The Receiver or Trustee Has the Burden of Establishing the Existence of a Lien Right in the Bankrupt.

In re Clark Supply Co., Inc. (7th Cir., 1949), 172 F. 2d 363, 364, held with respect to a lien claim:

"It is not claimed that appellee did not establish clear title to the generator before it was delivered to the bankrupt. (It must be conceded that appellee had clear title to the generator before it was delivered to the bankrupt.) In such a situation the burden of proving that appellee was deprived of its title rested on appellant, or, as is stated in 20 Am. Jur. p. 140: '*It is incumbent upon one claiming a peculiar right, not common to all, given by a statute, which is given only when a prescribed state of facts exists, to show the existence of that state of facts.*'" (Emphasis added.)

III.

Under California Law the Bankrupt's Maximum Lien Is \$250.00.

Section 1208.61 of the California Code of Civil Procedure provides:

“Subject to the limitations set forth in this chapter, every person has a lien dependent upon possession for the compensation to which he is legally entitled for making repairs or performing labor upon, and furnishing supplies or materials for, and for the storage, repair, or safekeeping of, any aircraft, also for reasonable charges for the use of any landing aid furnished such aircraft and reasonable landing fees.”

Section 1208.62 of the California Code of Civil Procedure provides:

“That portion of such lien in excess of two hundred fifty dollars (\$250) for work or services rendered or performed at the request of any person other than the holder of the legal title is invalid, unless prior to commencing such work or service the *person claiming the lien gives actual notice to the legal owner and the mortgagee, if any, of the aircraft, and the written consent of the legal owner and the mortgagee of the aircraft is obtained before such work or services are performed.* For the purposes of this chapter the person named in the federal aircraft registration certificate issued by the Administrator of Civil Aeronautics shall be deemed to be the legal owner.” (Emphasis added.)

Section 3051 of the California Civil Code provides in part that:

“a person who makes, alters, or repairs any article of personal property, at the request of the owner, or

legal possessor of the property, has a lien on the same for his reasonable charge, for the balance due for such work done and materials furnished, and may retain possession of the same until the charges are paid;”

Section 3051(a) of the California Civil Code provides in part that:

“That portion of any lien, as provided for in the next preceding section, in excess of one hundred dollars (\$100), for any work, services, care, parking, or safekeeping rendered or performed at the request of any person other than the holder of the legal title, shall be invalid, unless prior to commencing any such work, service, care, parking, or safekeeping, the person claiming such lien shall give actual notice in writing either by personal service or by registered letter addressed to the holder of the legal title to such property, if known.”

The advent of bankruptcy does not give rise to liens where none existed under state law. *In re Hammond Interior Finish Co.* (C. C. A. 7th, 1926), 13 F. 2d 578, holds that:

“It must be conceded that the Indiana lien statutes determine the character, nature, and extent of petitioner’s lien, if any it has. Interesting as may be the study of different state statutes and the decisions of the state courts construing them, it is the Indiana lien statutes and the Indiana courts’ decisions that are decisive of the question presented to us.”

IV.

Under the Civil Aeronautics Act, Act of June 23, 1938, Ch. 601, 52 Stat. 977, 49 U. S. C., Sections 401 Through 705, Liens May Not Attach to Aircraft Without the Consent of the Registered Owner.

The Civil Aeronautics Act was reviewed at length in *In re Veterans Air Express Co.* (1948), 76 Fed. Supp. 684. The Court's opinion will serve to present the pertinent provisions of the Act and the law relative to appellant's contentions.

Briefly summarized the *Veterans' Air Express Co.* case involved the question of whether a mechanic's lien could be impressed against registered aircraft by virtue of Section 3051 (*supra*) of the California Civil Code as against a chattel mortgagee. The owner's title and the interest of the mortgagee were registered with the Civil Aeronautics Administration. Work was performed by the lien claimant subsequent to the recordation of the interest of the owner and of the mortgagee in excess of \$100,000.00. This work was performed at the request of the legal owner. The Court noted that the "consent" of the mortgagee "was not sought or obtained." The mortgagee successfully contended that since its interest in the aircraft was registered prior to the performance of the work that the lien provided for by the California law was invalid as to it.

In denying the lien claim, the Court reasoned:

"In the field of air transportation Congress early undertook to preempt the field of regulation and to deal with the entire field of activity by enactment of the Civil Aeronautics Act, Act of June 23, 1938, c. 601, 52 Stat. 977, 49 U. S. C. A. Sec. 401, *et seq.*, as amended. Section 3 of the Act, 49 U. S. C. A.

Sec. 403 states that 'There is hereby recognized and declared to exist in behalf of any citizen of the United States.' The declaration of policy stated by Congress in Section 2 of the Act, 49 U. S. C. A. Sec. 402, recites that among its purposes is the encouragement and development of civil aeronautics and 'of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service and of the national defense.' Under the provisions of Section 1 of the Act, 49 U. S. C. A. Sec. 401, 'operation of aircraft' or 'operate aircraft' is defined in subsection (26) as 'the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. * * *' Subsection (15) defines 'civil aircraft of the United States' as any aircraft 'registered as provided in this Act.'

"Section 501 of the Civil Aeronautics Act, 49 U. S. C. A. Sec. 521, so far as may be pertinent here, is as follows:

" '(a) It shall be unlawful for any person to operate or navigate any aircraft eligible for registration if such aircraft is not registered by its owner as provided in this section, or * * * to operate or navigate within the United States any aircraft not eligible for registration: Provided, That aircraft of the national defense forces of the United States may be operated and navigated without being so registered if such aircraft are identified, by the agency having jurisdiction over them, in a manner satisfactory to the Administrator of Civil Aeronautics. The Administrator of Civil Aeronautics may, by regulation, permit the operation and navigation of aircraft without registration by the owner for such reasonable periods after transfer of ownership thereof as the Administrator of Civil Aeronautics may prescribe.

“(b) An aircraft shall be eligible for registration if, but only if—

“(1) It is owned by a citizen of the United States and is not registered under the laws of any foreign country; or

* * * * *

“(c) Upon request of the owner of any aircraft eligible for registration, such aircraft shall be registered by the Administrator of Civil Aeronautics and the Administrator of Civil Aeronautics shall issue to the owner thereof a certificate of registration.

“(d) Applications for such certificates shall be in such form, be filed in such manner, and contain such information as the Administrator of Civil Aeronautics may require.’

“Finally, Section 503 of the Act, 49 U. S. C. A. Section 523, provides as follows:°

“(a) The Board shall establish and maintain a system for recording all conveyances affecting the title to, or interest in, any civil aircraft of the United States.

“(b) No conveyance made or given on or after the effective date of this section which affects the title to, or interest in, any civil aircraft of the United States, or any portion thereof, shall be valid in respect of such aircraft or portion thereof against any person other than the person by whom the conveyance is made or given, his heirs or devisee, and any person having actual notice thereof, until such conveyance is recorded in the office of the secretary of the Board. Every such conveyance so recorded in the office of the secretary of the Board shall be valid as to all persons

°49 U. S. C. A. Sec. 523(a)(1), (c) and (e) as amended in 1948 is set forth in Appendix, page 7.

without further recordation. Any instrument, recordation of which is required by the provisions of this section, shall take effect from the date of its recordation, and not from the date of its execution.

“(c) No conveyance shall be recorded unless it states the interest in the aircraft of the person by whom such conveyance is made or given or, in the case of a contract of conditional sale, the interest of the vendor, and states the interest transferred by the conveyance, and unless it shall have been acknowledged before a notary public or other officer authorized by law of the United States, or of a State, Territory, or possession thereof, or the District of Columbia, to take acknowledgment of deeds.’ * * *

“Regulation 503, dealing with the recordation of aircraft ownership, is particularly pertinent here. It is as follows:

“ ‘501.1. Recordation required. All conveyances affecting the title to, or interest in, any aircraft registered under the provisions of the Civil Aeronautics Act of 1938, as amended, shall be executed upon the application form prescribed by the Administrator, or a form deemed by the Administrator to be its equivalent, and shall be recorded with the Administrator.’ ” * * *

“In view of the novelty of the question presented in this case, the Court has deemed it necessary to set forth in detail the statutory and regulatory framework of aircraft ownership and conveyance. It is clear that Congress has prescribed the only way in which aircraft may be transferred and in which liens upon aircraft may be duly recorded. In this manner, all persons dealing with aircraft are upon full legal notice concerning possible liens and are charged with the duty of inquiry at the central recording office of

the Civil Aeronautics Administration with respect to any aircraft in which they might be concerned.”⁷

If an owner of a registered aircraft in dealing with its property cannot subject the aircraft to liens without the consent of a chattel mortgagee notwithstanding state law would purport to create such a lien, does it not follow that third parties dealing with a registered aircraft having no proprietary rights therein cannot by their dealings with respect to a registered aircraft subject it to liens without the consent of the legal owner? Particularly is this so where the state law expressly provides that no lien shall arise in excess of \$250.00 without the prior written consent of the registered owner.

V.

No Equitable Lien Arose Against Appellant's Aircraft.

Equity may not, any more than the law, disregard the conditions imposed by statute upon the substance of a transaction. Presumably the bankrupt had a good claim against the several companies specifically requesting debtor's services. The imposition of a lien on appellant's aircraft unjustifiably shifts the burden to appellant.

Equity does not ignore legal rights. This is not a case involving a fraud, misrepresentation, breach of a fiduciary relationship or any other of the traditional factors normally giving rise to special equitable rights.

The District Court has found:

1. Finding I. That appellant was the legal owner [R. 22].

⁷Current regulations are contained in Title 14 of the Code of Federal Regulations. See Appendix, pages 4 to 6 for pertinent regulations currently in effect.

2. Finding II. That appellant had leased the aircraft to American Airways, Inc., by a lease providing that lessee would keep the aircraft in good repair at *lessee's expense* [R. 22].

3. Findings II and IV. That the aircraft was in need of the work performed [R. 23-24].

4. Finding III. That the work of the bankrupt was performed at the oral request of American Airways, Inc. [R. 22-23].⁸

5. Finding VII. That the bankrupt knew that appellant was the legal owner but did not notify appellant of the contemplated repairs or secure its consent [R. 23-24].

In holding that the foregoing gave rise to an "equitable lien" the District Court has substituted "equitable maxims" for legal and equitable jurisprudence and without regard to the proper application of those maxims. This is quite evident from the Court's Memorandum Opinion of May 21, 1954 [R. 14-21]. In commenting on the law the Referee stated that

"There does not appear to be any basis for a legal lien, since the provisions of Sections 1208.61 and 1208.62 of the California Code of Civil Procedure were not followed." * * *

⁸The lease referred to is Appellant's Exhibit 1. The lease is an agreement between appellant and Air America, Inc. The Court erroneously found that the lease was with American Airways, Inc. From pages 39 through 50 of the Transcript of Record it would appear that the work was orally contracted for on behalf of the aircraft by Sig Shore, Mr. Miller and Donald Rich, also known as Donald Reichgott, who were "of" [R. 39] or "president" or "major stockholder" or "chairman" of the Board [R. 40] of U. S. Airlines and/or Air America, Inc. Appellee's Exhibit 6 being Invoice No. 1550 in the amount of \$1,478.00, was billed to U. S. Airlines.

“But the question remains whether or not this Court may impress an equitable lien upon the plane even though the legal lien could not exceed \$250.00” [R. 16-17].

Under its “Conclusion” and Opinion continues:

“The bankruptcy court is not bound to follow the California law above cited when determining, as a matter of equity, what is the just and proper thing to do” [R. 20].

The result of the foregoing reasoning is a declaration that although the aircraft is not subject to a lien the bankrupt may retain possession as though one existed. If, as appellant contends, the law makes this aircraft immune from repair liens, it is not “just and proper” for that immunity to be denied an owner because of the bankruptcy of some stranger or our personal dissatisfaction with the law.

This position was stated somewhat more forcibly by the Court in *United States v. Killoren* (8 Cir., 1941), 119 F. 2d 364, 366, in discussing the jurisdiction of the bankruptcy court as follows:

“It has not, however, plenary jurisdiction in equity, but is confined, in the application of the rules and principles of equity, to the jurisdiction conferred upon it by the provisions of the Bankruptcy Act, reasonably interpreted. *Johnson v. Norris* [5 Cir.], 190 F. 459, L. R. A. 1915B, 884; *In re Kane* [7 Cir.], 127 F. 552. *The plain mandate of the law cannot be set aside because of considerations which may appeal to referee or judge as falling within general principles of equity jurisprudence.*” (Emphasis added.)

As pointed out by Judge Yankwich in *In re Quartz Crystal Products Co.* (1947), 71 Fed. Supp. 949, statutory rights of litigants “cannot be determined by general ref-

erences to bankruptcy powers” or general “equitable bankruptcy principles.”

Under California law equitable liens do not arise simply because a legal lien fails.

In *Lass v. Eliassen* (1928), 94 Cal. App. 175 at page 179, it was held that:

“Rules of equity cannot be intruded in matters that are plain and fully covered by positive statute (*Beeson v. Brotherhood of Locomotive Firemen, etc.*, 101 Kan. 399 [166 Pac. 466]). Neither a fiction nor a maxim may nullify a statute (*Harrison Machine Works v. Auferheide* (Mo. App.), 280 S. W. 711). *Nor will a court of equity ever lend its aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly* (*Jackson v. Torrence*, 83 Cal. 521, 537 [23 Pac. 695]).” (Emphasis added.)

Quest v. Sandman (1908), 154 Cal. 748.

Work performed by employees of a contractor does not give employee right of lien for their service where contract was between contractor and owner.

Lowe v. Woods (1893), 100 Cal. 408.

A purchaser of a horse under a conditional sales contract may not subject the horse to a livery and feed stable lien for feed and care furnished without the consent of the owner. The Court’s discussion of the case is set forth at page 412 as follows:

“Adams being the owner of the horse, without her assent Woods could not sell it; he could not pledge it; neither had he the power to create a lien upon it by placing it in the hands of an agistor. Without any contract upon appellant’s part, without any personal liability whatever, without her assent in any form, and even without any notice to her of the facts which are claimed to have created the lien, it is now sought

to take her property and apply it to the satisfaction of Wood's debt. Such a practice would be violative of the fundamental principle of law that no man's property can be taken from him without his consent."

In *Hackett v. California Laundry* (1935), 7 Cal. App. 2d Supp. 757 the Court held that a lien of a laundry for laundering household furnishings at the request of the tenant of the house is limited to \$100.00. The Court reasoned at page 759 as follows:

"Respondent, however, argues that the tenant was the agent of the owner to have the necessary laundry work done. It bases this argument on the fact that when the owner leased the furnished house to the tenant she knew that it would be necessary to have the furnishings laundered from time to time. It is of course true that the tenant had authority to have the furnishings laundered when necessary, but it does not follow that the tenant had authority to have the laundry work done for and on behalf of the owner, or on credit, in the absence of an agreement conferring such authority. Certainly the tenant had no authority to have the laundering done on the owner's credit and thereby to subject the owner's property to a lien as security therefor."

Accord:

Howard v. Societa Di Unione e Beneficenza Italiana (1944), 62 Cal. App. 2d 842.

These courts too had equitable jurisdiction.

Cal. Code Civ. Proc., Section 307.⁹

⁹Code Civ. Proc., Sec. 307. "There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs." Compare 11 U. S. C. A. Sec. 11(a), Courts of Bankruptcy are invested, "with such jurisdiction *at law and in equity* as will enable them to exercise original jurisdiction. * * *

VI.

**Appellee Has Failed to Prove the Reasonable Value
of the Work Performed.**

Evidence of billings rendered will not support a finding of reasonable value, *Boyd v. Ibbetson* (1928), 90 Cal. App. 298. The proper measure is the customary charges of others for similar services (20 *Am. Jur.* Sec. 386, p. 349). Evidence of billings is much less evidence of an equitable lien predicated upon equitable maxims.

Conclusion.

The “equitable lien” theory advanced by Referee Hunt and endorsed by Judge Westover ignores the law of the case. The theory overrides the law of California relative to liens and the Civil Aeronautics Act of 1938. As applied in this instance the holding declares that the mere performance of work gives rise to a lien in the amount of the artisan’s billing. Clothing the lien in equitable garments does not alter the effect of the decision appealed from.




Respectfully submitted,

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APPENDIX.

Form ACA-500.1 (8-51)	UNITED STATES OF AMERICA DEPARTMENT OF COMMERCE CIVIL AERONAUTICS ADMINISTRATION										
PART A	CERTIFICATE OF REGISTRATION										
1. NATIONALITY AND REGISTRATION MARKS	2. MAKE OF AIRCRAFT	3. AIRCRAFT SERIAL NO.									
N 53472	Curtiss-Wright	2932									
<div style="text-align: right;">16-57452-8 GPO</div> <div style="border: 1px solid black; padding: 10px; margin: 10px 0;"> <div data-bbox="142 807 474 837" data-label="Text">Colonial Trust Company</div> <div data-bbox="117 839 220 855" data-label="Text">NAME OF OWNER</div> <div data-bbox="146 864 355 894" data-label="Text">90 Wall Street</div> <div data-bbox="117 896 241 911" data-label="Text">ADDRESS OF OWNER</div> <div data-bbox="324 896 376 911" data-label="Text">NUMBER</div> <div data-bbox="504 896 552 911" data-label="Text">STREET</div> <div data-bbox="146 922 269 950" data-label="Text">New York</div> <div data-bbox="438 922 562 950" data-label="Text">New York</div> <div data-bbox="117 952 148 968" data-label="Text">CITY</div> <div data-bbox="324 952 360 968" data-label="Text">ZONE</div> <div data-bbox="509 952 545 968" data-label="Text">STAT.</div> </div> <div data-bbox="58 1005 911 1054" data-label="Text"> <p>6. It is hereby certified that the above-described aircraft has been duly entered on the register of the Civil Aeronautics Administration, Department of Commerce, United States of America, in accordance with the Convention on International Civil Aviation dated 7th December 1944, and with the Civil Aeronautics Act of 1938, as amended.</p> </div> <tr> <td data-bbox="58 1070 192 1091">DATE OF ISSUE:</td> <td colspan="3" data-bbox="407 1070 739 1091">BY DIRECTION OF THE ADMINISTRATOR:</td> </tr> <tr> <td data-bbox="73 1095 311 1125">December 3, 1951</td> <td colspan="3" data-bbox="376 1083 924 1143">  CHIEF, AIRCRAFT DIVISION </td> </tr>				DATE OF ISSUE:	BY DIRECTION OF THE ADMINISTRATOR:			December 3, 1951	 CHIEF, AIRCRAFT DIVISION		
DATE OF ISSUE:	BY DIRECTION OF THE ADMINISTRATOR:										
December 3, 1951	 CHIEF, AIRCRAFT DIVISION										

LEASE—PARAGRAPH

FOURTH: (a) The Company, during the continuance of this Lease shall maintain and keep all of the Trust Equipment in good order and proper repair, at its own expense, and shall replace, at its own expense, any of the Trust Equipment that may be released, worn out, unsuitable for use, lost or destroyed, by its equivalent of substantially as good material and construction and of a value equal to the value of the equipment so released, worn out, unsuitable for use, lost or destroyed, marked as in this Lease provided, the value of the new equipment to be figured at cost if that be below market value, or at market value if that be below such cost; provided, however, that the Company may in lieu of such replacement, deposit with the Trustee in cash and in trust for the benefit of the holders of the Trust Certificates pending replacement of such Trust Equipment, the then fair value of such equipment so released, worn out, unsuitable for use, lost or destroyed (such for value to be determined and any moneys so deposited to be held and applied as provided in paragraph "Seventh" of this Lease). The rights and remedies of the Trustee to enforce or to recover any of the rental payments shall not be affected by reason of such release, wearing out, unsuitableness for use, loss or destruction. The title to all equipment procured for such replacement shall be taken in the name of the Trustee, free from liens and encumbrances.

* * *

FIFTH: The Company, so long as it shall not be in default under this Lease, shall be entitled to the possession of the Trust Equipment and the use thereof.

The Company covenants to file and record this Lease and said Agreement and any supplemental Lease executed pursuant to the provisions hereof.

The Company shall not assign or transfer this Lease, or transfer or sublet (except to some company all of whose capital stock is owned by the Company) the Trust Equipment or any part thereof, without the written consent of the Trustee first had and obtained, and the Trustee agrees that it will not unreasonably withhold its written consent to any sublessee having in mind the necessity of having the planes operated by sublessees in order that Air America, Inc. obtains revenue from which it can pay the rental provided herein; nor in any case unless said assignment, transfer or sublease shall be subject and subordinate to this Lease and said Agreement; and the Company shall not, without such written consent, except as hereinbefore provided, part with the possession of, or suffer or allow to pass out of its possession or control, any of the Trust Equipment. A transfer to an airline which shall acquire all or substantially all the operations of the Company and which shall assume and agree to perform each and all the obligations and covenants of the Company hereunder and under said agreement shall not be deemed a breach of this covenant, but a transfer through insolvency or under judicial process shall be deemed a breach of this covenant. The Trustee shall have the right to declare this Lease terminated in case of any unauthorized assignment or transfer of this Lease or transfer or sublease of the Trust Equipment. The election of the Trustee to terminate this Lease under this clause shall have the same effect as the retaking of the Trust Equipment by the Trustee as hereinafter provided.

TITLE 14—CODE OF FEDERAL REGULATIONS

PART 503—RECORDATION OF AIRCRAFT OWNERSHIP

Authority: §§503.1 to 503.3 issued under sec. 205, 52 Stat. 984, as amended; 49 U. S. C. 425. Interpret or apply sec. 503, 52 Stat. 1006, as amended; 49 U. S. C. 523.

Source: §§503.1 to 503.3 appear at 13 F. R. 5310, Sept. 11, 1948.

§503.1 Basis and purpose. The purpose of this part is to prescribe regulations for recordation of conveyances affecting the title to, or any interest in, any aircraft registered under the provisions of section 501 of the Civil Aeronautics Act of 1938, as amended, and Part 501 or Part 502 of this chapter. The basis for this part is found in sections 308 and 503 of the Civil Aeronautics Act of 1938, as amended.

* * *

§503.3 Eligibility of conveyances. A conveyance shall be eligible for recordation only if:

(a) It is executed upon the form prescribed by the Administrator for such type of conveyance, or upon a form deemed by the Administrator to be its equivalent;

(b) It is accompanied by a duly executed application for registration and the required registration fee, and complies with the other provisions of either §501.4 (a) or (b) of this chapter, whichever is applicable: Provided, That this paragraph shall not apply to conveyances affecting an interest in, but not title to, the aircraft;

(c) It affects an aircraft currently registered under the terms of the Civil Aeronautics Act of 1938, as amended;

(d) It is accompanied by the required recordation fee (see §407.14 of this chapter): Provided, That this paragraph shall apply only to conveyances executed for security purposes, and not to any release, cancellation, discharge, or satisfaction thereof; and

(e) It is acknowledged before a notary public or other officer authorized by law of the United States, or of a State, Territory or possession thereof, or the District of Columbia, to take acknowledgment of deeds.

PART 505—RECORDATION OF ENCUMBRANCES AGAINST AIRCRAFT ENGINES, PROPELLERS, APPLIANCES OR SPARE PARTS

Authority: §§505.1 to 505.3 issued under sec. 205, 52 Stat. 984, as amended; 49 U. S. C. 425. Interpret or apply sec. 503, 52 Stat. 1006, as amended; 49 U. S. C. 523.

Source: §§505.1 to 505.3 appear at 13 F. R. 5311, Sept. 11, 1948.

§505.1 Basis and purpose. The purpose of this part is to prescribe regulations for recordation of conveyances affecting the title to, or any interest in, any aircraft engines, propellers, or appliances maintained by or on behalf of an air carrier certificated under section 604 (b) of the Civil Aeronautics Act of 1938, as amended, for installation or use in aircraft, aircraft engines, or propellers, or any spare parts maintained by or on behalf of such an air carrier, which instrument need only describe generally by types the engines, propellers, appliances, and spare parts covered thereby and designate the location or locations thereof. The basis for this part is found in sections 308 and 503 of the Civil Aeronautics Act of 1938, as amended.

§505.2 Definitions. As used in this part, “conveyance” means:

(a) Any lease, mortgage, equipment, trust, contract of conditional sale, or other instrument executed for security purposes, which instrument affects the title to, or any interest in, any aircraft engines, propellers, appliances, or spare parts maintained by or on behalf of an air carrier certificated under section 604 (b) of the Civil Aeronautics Act of 1938, as amended;

(b) Any assignment, amendment, or supplement of or to any of the instruments set forth in paragraph (a) of this section; and

(c) Any release, cancellation, discharge, or satisfaction relating to any of the instruments set forth in paragraphs (a) and (b) of this section.

§505.3 Eligibility of conveyances. A conveyance shall be eligible for recordation only if:

(a) It affects aircraft engines, propellers, appliances, or spare parts maintained by or on behalf of an air carrier certificated under section 604 (b) of the Civil Aeronautics Act of 1938, as amended;

(b) It specifically describes the location or locations of the aircraft engines, propellers, appliances, and spare parts covered thereby;

(c) It is accompanied by the required recordation fee (see §407.33 of this chapter): Provided, That this paragraph shall not apply to any release, cancellation, discharge, or satisfaction relating to any conveyance recorded under this part; and

(d) It is acknowledged before a notary public or other officer authorized by law of the United States, or of a State, Territory, or possession thereof, or the District of Columbia, to take acknowledgment of deeds.

Section 503 of the Civil Aeronautics Act of June 23, 1938, c. 601, Title V, §503, as amended June 19, 1948, c. 523, §3, 62 Stat. 494, Title 49 U. S. C. A. §523:

“(a) The Administrator shall establish and maintain a system for the recording of each and all of the following:

(1) Any conveyance which affects the title to, or any interest in, any civil aircraft of the United States;”

* * *

“(c) No conveyance the recording of which is provided for by subsection (a) (1) of this section made on or after August 22, 1938, and no instrument the recording of which is provided for by subsection (a) (2) of this section or subsection (a) (3) of this section made on or after June 19, 1948, shall be valid in respect of such aircraft, aircraft engine or engines, propellers, appliances, or spare parts against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Administrator. For the purposes of this subsection, such conveyance or other instrument shall take effect from the time and date of its filing for recordation, and not from the time and date of its execution.”

* * *

“(e) No conveyance or other instrument shall be recorded unless it shall have been acknowledged before a notary public or other officer authorized by the law of the United States, or of a State, Territory, or possession thereof, or the District of Columbia, to take acknowledgment of deeds.”

* * *

TOPICAL INDEX

	PAGE
Statement of case.....	1
Summary of argument.....	2
Argument	2
Conclusion	4

TABLE OF AUTHORITIES CITED

CASES	PAGE
Henshaw's Estate, In re, 68 Cal. App. 2d 627.....	4
Lily Knit Silk Underwear, In re, 73 F. 2d 52.....	3
Loose, In re, 52 Fed. Supp. 20.....	2
Los Angeles Lumber Company, In re, 46 Fed. Supp. 77.....	2
Mannon v. Pesula, 59 Cal. App. 2d 597.....	4
Mortgage Guarantee Company v. Hammond Lumber Company, 13 Cal. App. 2d 538.....	4
Serle v. Mechanics Loan and Trust, 249 Fed. 942.....	3
Stegman v. Knudson, 152 F. 2d 871.....	2
Wagner v. Sariotti, 56 Cal. App. 2d 693.....	4

STATUTES

Code of Civil Procedure, Sec. 1208.61.....	2
Code of Civil Procedure, Sec. 1208.62.....	2

No. 14557

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COLONIAL TRUST COMPANY,

Appellant,

vs.

GEORGE GOGGIN, Trustee in Bankruptcy of the Estate of
INTERCONTINENTAL AIRWAYS, INC.,

Appellee.

APPELLEE'S OPENING BRIEF.

Statement of Case.

This is a proceeding between the registered legal owner of a C-46 transport aircraft No. N53472 and the receiver under an unconfirmed Chapter XI proceeding. The Appellant filed a petition for reclamation of property [Tr. p. 8], to which an answer was made [Tr. p. 10] by the receiver and on which a hearing was held.

The facts as set forth in the record can be summarized as follows: The Appellant, on August 30, 1951, leased to American Airways, Inc., by written agreement, the C-46 aircraft [Tr. p. 22, Finding II]. Thereafter, the debtor corporation, through its president, A. W. Schwimmer, arranged for certain repairs, installations, etc., with

Messrs. Shore, Miller and Rich [Tr. pp. 38-39]. Thereupon, the C-46 aircraft was brought to Burbank, California, and the work performed and billed to Air America in the sum of \$10,843.59 [Tr. p. 23, Finding III].

The work not being paid for, possession of the C-46 aircraft was retained by the debtor corporation and was in its possession at the time of the commencement of the bankruptcy proceedings.

Summary of Argument.

The conclusion of the court from which no appeal has been taken was that there was no *legal* lien which could be established by the receiver in bankruptcy against the Appellant here [Tr. p. 16]. The court concluded [Tr. p. 24], however, that the debtor corporation and the receiver acting for it had an equitable lien in the sum of \$10,843.59. Thus, Appellee apprehends the issue to be:

Does the receiver have an equitable lien on the C-46 Curtis Wright aircraft?

Argument.

As indicated hereinbefore, California Code of Civil Procedure, Sections 1208.61 and 1208.62 exclude the possibility of a legal lien in this matter in excess of the sum of \$250.00 and therefore the rights of the Appellee must proceed on equitable principals.

It has long been recognized that the courts of bankruptcy are courts of equity, *In re Loose*, 52 Fed. Supp. 20; *Stegman v. Knudson* (C. C. A. 9th), 152 F. 2d 871. As courts of equity the bankruptcy courts apply equitable principals, *In re L. A. Lumber Company*, 46 Fed. Supp. 77.

This case is a peculiarly apposite one for the application of equitable principals. The Appellant is the owner of an aircraft which, according to the findings and testimony, had been operated by Air America until it had arrived at such a state that the Civil Aeronautics authority would not permit further operation whatsoever until the same had certain modifications and repairs made thereon. Under its lease agreement, Air America was obligated to keep the aircraft in an operable condition. (See appendix of Appellant's lease—Par. IV.) Accordingly, it placed the aircraft in the possession of the debtor corporation who expended time and labor upon it in the sum of \$10,-843.59, presumptively benefiting the plane to that extent and making those changes which were required so that it could be operated. Now the Appellant comes into a court of equity and brazenly seeks the delivery of the aircraft, including these improvements, the value for which no payment has ever been made, and presumes to contend that it is only liable for \$250.00 at the outside, and perhaps not even that amount.

Those who come into equity must come with clean hands and this is true in a bankruptcy proceeding as in any other equitable proceeding. (See *Serle v. Mechanics Loan and Trust* (C. C. A. 9th), 249 Fed. 942; *In re Lily Knit Silk Underwear* (C. C. A. 2d), 73 F. 2d 52.) This Appellant as petitioner below, was not prepared to render a fair and reasonable payment for the work and materials expended on its asset.

In this status of the situation, the equitable lien doctrine is available and was employed by the court to protect the rights of the debtor corporation. Equitable liens have always been favored to prevent unconscionable and equit-

able assertions of rights and to bring about just and fair results. (*In re Henshaw's Estate*, 68 Cal. App. 2d 627; *Mannon v. Pesula*, 59 Cal. App. 2d 597; *Wagner v. Sariotti*, 56 Cal. App. 2d 693; *Mortgage Guarantee Company v. Hammond Lumber Company*, 13 Cal. App. 2d 538.)

Conclusion.

The equitable lien theory employed by the Referee and affirmed by the District Judge is proper in a bankruptcy proceeding to produce an equitable result and protect the investment of time and materials of this debtor corporation which Appellant seeks to appropriate to its own benefit by contending for a narrow enforcement of legal rights alone.

Respectfully submitted,

CRAIG, WELLER & LAUGHARN,
FRANK C. WELLER,
THOMAS S. TOBIN,
C. E. H. McDONNELL,

Attorneys for Appellee.